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WILLS AND ESTATE PLANNING

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ON

ESTATE PLANNING

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Introduction

1. ESTATE PLANNING

There is no universally accepted definition of estate planning. While, in general terms, it may be said to concern the orderly arrangement and disposition of a client's property, those who use the term differ as to the goals and purposes to be achieved and the emphasis which is to be given to each of them. In its widest sense, estate planning is synonymous with lifetime and testamentary financial planning and is directed at the accumulation of wealth, its disposition for the benefit of succeeding generations and, at all times, its protection from unnecessary erosion. In a more narrow sense the term is confined to plans for the disposition of property rather than to those which are aimed as well at its accumulation and preservation during the client's lifetime.

Within these two concepts there is room for considerable variation in emphasis. For some it is placed almost exclusively on tax planning with this concept either including or excluding the more subtle and artificial methods of keeping a client and his estate within the letter of the law. The identification of estate planning with ingenious tax avoidance devices, together, perhaps, with its use in commercial advertising has brought the name into disrepute in some quarters.[1] In recent years, however, it has been used increasingly to refer to a field of legal practice which is as old as the common law. This usage of the term and the precise significance it attributes to taxation is clearly described in the following passage:

> Estate planning is a current name for something which has always been done by the careful family lawyer: advising his clients as to arrangements for the most effective disposition of their capital and the income thereof.
>
> The "*most effective disposition*" is the disposition which best suits the needs and personalities of the persons concerned and which is the most economical disposition, i.e., with the least amount of shrinkage by reason

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[1] "The expression 'estate planning' was invented about 30 years ago to promote sales of life insurance": Trachtman, "A Credo for Estate Lawyers" (1961), 100 Trusts and Estates 871.

of taxes and otherwise. If one strives for tax savings *per se*, the most effective disposition may or may not be achieved, because tax savings are almost always effected by some kind of irrevocable relinquishment which may or may not turn out to be desirable. Tax saving is but one of the elements of proper estate planning; much more than a knowledge of tax law is essential. Eagerness to produce tax saving has stimulated the use of ancient forms of transfer, such as trusts and powers of appointment, by persons who might not otherwise have used them and who are not always aware of the problems which they present. To discuss estate planning in a series of monographs on taxation tends to magnify the tax problem. It is important therefore (instead of indulging in the usual pious warning against over-emphasizing tax saving) to give adequate consideration to the many other equally important problems in estate planning.

There are no standard solutions; no universal remedies, every case must receive the same special treatment which a patient expects from a physician.[2]

• • • A knowledge of tax law is an essential part of an estate planner's equipment but tax consequence should not be allowed to override or dominate the client's non-tax objectives. The crucial considerations must be the client's wishes with respect to the destination, apportionment and allocation of his property. The lawyer's role, in general terms, is to ascertain the wishes of the client as to the disposition of the estate and to ensure that he or she is aware of the extent and nature of the property which comprises it, of any contingencies which might affect his or her wishes with respect to its transmission, of the alternative methods by which those wishes might be implemented and of the consequences—revenue and otherwise—of each such method. When a plan has been approved by the client it will normally be the lawyer's responsibility to see that the legal requirements for its execution are complied with.

Revenue consequences will obviously have more importance for some clients than for others, but it would be a mistake to assume that they will have significance only in the case of large estates or for clients who are prepared, if not anxious, to engage in sophisticated tax avoidance schemes. As long as there are taxation statutes which affect property, the flexibility of property law and the different modes of disposition it permits will make it inevitable that some types of disposition will attract more severe tax consequences than others. This is as

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[2]Trachtman, *Estate Planning* (rev. ed. 1968), pp. 1-2.

much a fact in Canada as in jurisdictions which still collect gift and death taxes of the traditional kinds. By itself this provides an adequate answer to those who assert that estate planning in the particular sense which has been adopted here is a reprehensible exercise. Among practitioners and their clients there are vast differences of opinion as to the morality of attempts to avoid taxation by ingenious and often complex arrangements which, while offending the spirit of the revenue law, are designed to satisfy its letter.[3] Those who do not regard the prospect of failure or success as the only relevant criterion will often fail to agree on where the line should be drawn. Despite this lack of unanimity on the fringes it remains a fact that most of the taxation work in which Canadian estate planners are daily engaged is far removed from the kind of activity which has been described as "a cheap exercise in tax avoidance".[4]

In recent years, such schemes have received little encouragement from the judiciary and, with the enactment of the general anti-avoidance rule in section 245 of the Income Tax Act, they are even less likely to be successful.

However, until the unlikely event that it becomes obligatory for taxpayers to arrange their affairs so as to attract the maximum liability for taxation, advice with respect to taxation will be an essential and reputable function of the lawyer who is engaged in estate planning. It can hardly be questioned that, at the present day, a lawyer who attempts to assist clients to dispose of their property without a knowledge of, and a regard for, revenue consequences will be in breach of his or her professional obligations.[5]

2. GENERAL OBJECTIVES

An intestate estate is usually an unplanned estate and, although each of the Canadian provinces has laws which govern the distribution of property on an intestacy, there are certain obvious reasons why an individual should normally have a will. Quite apart from some archaic

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[3]The differences are also reflected to a large extent in the attitudes of judges: see Bittker, B.I., *Professional Responsibility in Federal Tax Practice* (Federal Tax Press Inc., 1976); F.S.A. Wheatcroft, "Ethical Restraints on Tax Practice in Great Britain", p. 327 at 334-335.

[4]*Re Weston's Settlements*, [1969] 1 Ch. 223 at 227, per Stamp J.; affirmed [1969] 1 Ch. 234 (C.A.).

[5]*Cf. Farish v. Nat. Trust Co.*, [1975] 3 W.W.R. 499 (B.C.S.C.), particularly at 507 and 510.

features, the relevant statutes are inevitably unsatisfactory because of the rigidity of the schemes they impose. An intestate estate will be distributed to persons whom the deceased may not have wished to benefit or may have wished to benefit in different proportions. Others whom the deceased might have preferred to benefit may be excluded. By making a will an individual can choose beneficiaries and the amounts each is to receive, provide for contingencies which may occur either before or after death,[6] separate the management from the enjoyment of property where this is deemed appropriate and, generally dictate the manner in which the estate is to be administered and its benefits allocated for a considerable period after the individual's death.

In the common law provinces no person will have any legal right or power to take possession of the property of an intestate until an application has been made to the court for a grant of letters of adminstration. For these purposes, administration bonds may be required, there may be disputes as to whom letters of administration may be granted, and in some cases the persons whom the deceased might have chosen will not be appointed. The appointment of an executor by will should avoid these difficulties. The executor's title will vest upon the death of the deceased and continuity of control over the estate should thereby be established in a person in whom the deceased had confidence and whose rights should be unquestionable. In particular cases, the impact of taxation on the estate may be affected substantially by a carefully drafted will.[7]

If the composition and execution of a will can be regarded as almost the irreducible minimum of estate planning, it will not be sufficient for many clients. Some will wish to retain full ownership and control of their estates until their deaths; others will wish to dispose of part of their property in their lifetimes for the benefit of their spouses or descendants or in support of philanthropic activities. • • •

Developments in matrimonial property law in the common law provinces have introduced a new

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[6]The greatest flexibility can be obtained by the use of discretionary powers; see Chapter 4.

[7]And, conversely, the taxation consequences may destroy the whole dispositive scheme if the will is not drafted with sufficient care; see, for example, *Johnson v. M.N.R.* (1958), 58 D.T.C. 592 (T.A.B.).

element to be considered when drafting wills, and the practice of supplementing a will with a domestic contract is becoming increasingly common.

The main responsibilities of the lawyer in estate planning have been outlined above but it must be stressed that they are not confined to ascertaining the client's wishes and then implementing them by the method which will attract the smallest liability in tax. At the first interview many clients will have only the most sketchy idea of how they wish to dispose of their estates. Few will have thought of all the contingencies which should be provided for and some will lack a full appreciation of the extent or value of their property. It follows that, in taking instructions, the experienced lawyer will rarely play a passive role. Although the lawyer will be concerned entirely to ascertain the wishes of the client he or she may have a highly significant part to play in their evolution. For that purpose a knowledge of the limits on the freedom of testamentary disposition which are imposed by the general law and by statutes, such as those that confer rights upon surviving spouses or relief for other dependants, will be often relevant.

Even the simplest form of estate planning cannot be viewed as a mechanical exercise. Individuals in similar financial circumstances may differ widely in their attitudes towards their property and their families. The dispositive wishes of clients with estates of moderate size will sometimes require more elaborate wills than those of wealthier individuals. Some clients will be happy to relinquish ownership and control of their assets while relatively young and in good health. Others, for a variety of reasons, will wish to retain ownership or control until death.

When a plan or alternative plans are placed before the client, it is part of the lawyer's responsibility to see that they are properly understood and their implications fully appreciated. There are many reported cases which illustrate the consequences of a failure to discharge this obligation. If a taxpayer's objection to an assessment is based on the intention with which particular acts were done he or she will be in obvious difficulty if unable to state and explain what was intended.

After a plan has been chosen great care must be taken to ensure that it is implemented in a way that is beyond legal challenge. If there have been many cases of wills and trusts instruments which have been drafted with due care and expertise in all respects other than their tax implications, there have also been many in which tax planning by specialists has been frustrated by inadequate attention to the requirements of the general law.

Where an estate is large or complex the formulation of possible plans of disposition may require the use of the services of knowledgeable professionals in other fields. The relationship between their functions and those of the lawyer has been described as follows:

> As the problems of estate planning increase in complexity, in fluctuation, and in number, the need and opportunity may arise for specialization to a degree not possible for the average solicitor, so that other expert services will be necessary. Estate planning has sometimes been described as the work of a team, which may comprise a life insurance underwriter, an accountant, an investment counsel, a valuator, a trust officer, and, finally, a lawyer. Though each of these other vocations is vested with special knowledge or competence to assist in estate planning, none of them is in a position to carry out estate planning properly singlehanded. Life underwriters are in the field because they have something to sell. Their form of estate planning is attractive because there is no direct charge for it; but there is little to merit their entry into the field of estate planning beyond advising on the types of insurance and their possible uses. The same observation is applicable to other groups mentioned. The accountant is favourably situated in that his work takes him closely into the client's business affairs from which position he can assess the need for a plan, can impress his client with the dangers of neglecting to plan, and can stimulate his interest in doing something about it. Advice from any source in regard to estate planning and particularly the taxation aspect of it, cannot be properly undertaken except by someone trained in knowing the full legal significance of every step that must be taken in implementing the advice.
>
> The lawyer who does not wish to develop the skills and abilities of these other vocations nevertheless has an important service that he can and should render. He can select or recommend these experts, judge their competence, supervise and revise their work, and weigh the practical wisdom of suggestions they may make. Finally, he can insist on his position of independence in giving his client advice in relation to any aspect of it . . . The responsibility for estate planning rests ultimately on the lawyer whose position as independent adviser, charging on a straight fee basis for time spent and advice given, renders him best suited to this important function that has traditionally belonged to his profession.[9]

In particular, it must be emphasized that, despite the lamentable attempts in recent years to reduce the provisions of the Income Tax Act[10] to a series of quasi-mathematical formulae, the task of interpreting a taxing statute is properly that of a person with legal training. Of

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[9] La Brie, "Estate Planning" (1964), 3 Alta. L. Rev. 225 at 227.

[10] R.S.C. 1952, c. 148 as amended by S.C. 1970-71-72, c. 63 and more recent statutes.

necessity, such statutes are built upon a foundation of private law concepts, rules and institutions. No professional should be regarded as qualified to give tax advice, and much less advice on estate planning generally, to the public unless such professional has a sound knowledge of the law relating to corporations, trusts, partnerships and of the general principles of commercial and property law, including the law of wills. Although there are undoubtedly accountants and others who have acquired such knowledge and who are skilled tax practitioners in every sense, the importance of a formal training in law cannot be over-emphasized.

It is also important to stress that the responsibility of the lawyer to see that an estate plan is properly implemented cannot be delegated to other professionals, however valuable their contribution to the formulation of the plan may have been. This requires an attention to the substantive requirements and formalities for particular kinds of dispositions and methods of holding property, to the order in which dispositions and other transactions are effected and to proper documentation.

In cases where attempts at estate planning subsequently encounter problems with Revenue Canada or other taxation authorities, the legal practitioner should be uniquely qualified to conduct any necessary negotiations or appeals.

Glossary of Terms

Beneficiary	In general, the person receiving or designated to receive a benefit or advantage. 1. the person named in a **will** to receive property under the will. 2. The person having the beneficial enjoyment of property rather than the legal possession - for example, the person for the benefit of whom a **trust** is created or, in other words, the CESTUI QUE TRUST in a trust relationship.
Personal representative	The executor or administrator of a deceased person.
Intestate	To die without a will. A person is said to die intestate when he or she dies without making a will, or dies without leaving anything to testify what his or her wishes were with respect to the disposal of his or her property after his or her death. Under such circumstances, provincial law prescribes who will receive the decedent's property. The laws of intestate succession generally favour the surviving spouse, children and grandchildren and then move to parents and grandparents and to brothers and sisters. The word is also often used to signify the person himself or herself. Thus, in speaking of the property of a person who died intestate, it is common to say "the intestate's property," *i.e.*, the property of the person dying in an intestate condition. *Compare* Testate.
Testate	To die leaving a will.
Testator/Testatrix	One who has made a will; one who dies leaving a will.